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Before the
Federal Communications Commission
Washington, D.C. 20554

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| In the Matter of Application of |) | WT Docket No. 04-153 |
| |) | |
| RICHARD A. BURTON |) | FCC File No. 0001606053 |
| |) | |
| For General Mobile Radio Service License |) | |

HEARING DESIGNATION ORDER

Adopted: April 8, 2004

Released: April 19, 2004

By the Chief, Public Safety and Critical Infrastructure Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. By this *Hearing Designation Order*, we commence a hearing before an FCC Administrative Law Judge (ALJ) to determine whether the captioned application by Richard A. Burton (Burton) for a new General Mobile Radio Service (GMRS) license should be granted. As discussed below, Burton has been convicted on four separate occasions for the unlicensed operation of a radio transmission apparatus in violation of Sections 301 or 318 of the Communications Act of 1934, as amended (Act).¹ In addition, Burton had his amateur radio license revoked in 1981 for willful and repeated violation of the Commission's regulations governing the Amateur Radio Service.² In 1992, his application for new amateur radio station and operator licenses was designated for hearing based on character qualifications issues arising from the 1981 license revocation and the first two of his four felony convictions³ for unlicensed radio operations.⁴ Based on the information before us, we believe that Burton's history of repeated violations of the Act and the Commission's Rules raises a substantial and material question of fact as to whether he possesses the requisite character qualifications to be a Commission licensee. Because we are unable to make a determination on the record currently before us that grant of Burton's application for a new GMRS license would serve the public interest, convenience, and necessity, we hereby designate the application for hearing, as required by Section 309(e) of the Act.⁵

¹ 47 U.S.C. §§ 301, 318

² In the Matter of the Application of Richard A. Burton, Harbor City, California, for Amateur Station and Operator Licenses, *Decision*, PR Docket No. 92-144, 7 FCC Rcd 7272, 7272 n.1 (Rev. Bd. 1992) (*1992 Rev. Bd. Decision*) (citing *Order of Revocation and Affirmation*, PR Docket No. 81-444 (Sept. 11, 1981)).

³ Burton's two most recent felony convictions occurred after the completion of the 1992 administrative proceedings.

⁴ In the Matter of the Application of Richard A. Burton, Harbor City, California, for Amateur Station and Operator Licenses, *Hearing Designation Order*, PR Docket No. 92-144, 7 FCC Rcd 4329 (PRB 1992) (*1992 HDO*). The applications were ultimately denied by Summary Decision both on the merits and because of Burton's failure to prosecute. In the Matter of the Application of Richard A. Burton, Harbor City, California, for Amateur Station and Operator Licenses, *Summary Decision of Administrative Law Judge Edward J. Kuhlmann*, PR Docket No. 92-144, 7 FCC Rcd 5481 (ALJ 1992) (*1992 Summary Decision*). That decision was later affirmed by the Commission's Review Board *1992 Rev Bd Decision*, 7 FCC Rcd at 7273.

⁵ 47 U.S.C. § 309(e).

II. BACKGROUND

2. Burton's record of adjudicated transgressions began in 1981, when the Commission revoked his Amateur Radio Service license for Call Sign WB6JAC and affirmed the suspension of his General Class amateur operator license. These sanctions were imposed on the basis of a finding that Burton had committed "willful and repeated violations" of the Commission's Rules governing the Amateur Radio Service.⁶ Specifically, Mr. Burton had repeatedly violated the operating procedures prescribed in Part 97 of the Commission's Rules.⁷

3. On June 28, 1982, Burton was convicted of four counts of transmitting radio signals without a license in violation of Section 318 of the Act.⁸ Burton was ultimately sentenced to four concurrent one-year terms of imprisonment, all but six months of which was suspended, and was placed on probation for five years. On December 31, 1984, Burton violated the terms of his probation by operating a radio apparatus without a license. As a consequence, his sentence was modified on May 1, 1985, to mandate therapy during the period of his probation.⁹

4. On October 1, 1990, Burton was again convicted of unlicensed operation in violation of Section 318 of the Act.¹⁰ He was sentenced to one year of probation and fined \$2,000.

5. Following his second conviction for unlicensed operation, Burton applied for a new Amateur Radio Service license. The Commission issued a *Hearing Designation Order* in 1992 to determine whether Burton had the requisite character qualifications to hold the new amateur radio station and operator licenses for which he had applied.¹¹ The presiding ALJ directed the parties – Burton and the Commission's former Private Radio Bureau (PRB) – to file an outline of evidence to be submitted at the hearing and a list of witnesses by July 29, 1992.¹² Burton did not comply with this Order. On July 31, 1992, the PRB moved for summary decision. Burton did not oppose the motion. On August 18, 1992, the ALJ issued a summary decision against Burton. The ALJ found that denial of Burton's application was warranted on the basis of Burton's "ten year history of violating the Communications Act," and concluded that Burton is "unqualified to become a licensee."¹³ The ALJ also noted that Mr. Burton had failed to prosecute his application.¹⁴ The Commission's Review Board later affirmed the ALJ's findings and conclusions in all respects, and accordingly denied Burton's exceptions to the summary decision.¹⁵

⁶ 1992 HDO, 7 FCC Rcd at 4329 ¶ 2. See also 1992 Summary Decision, 7 FCC Rcd at 5481 ¶ 3.

⁷ 1992 Summary Decision, 7 FCC Rcd at 5481 ¶ 3.

⁸ *U.S. v. Burton*, No. CR 82-378-R (C.D. Cal. June 28, 1982). Burton was also convicted of two counts of transmitting obscene, indecent, or profane words, language, or meaning, in violation of 18 U.S.C. § 1464. In 1983, however, the U.S. Court of Appeals for the Ninth Circuit reversed Burton's conviction for violating 18 U.S.C. § 1464, while affirming the conviction for violating Section 318 of the Act. *U.S. v. Burton*, No. 82-1391 (9th Cir. Oct. 25, 1983).

⁹ *U.S. v. Burton*, No. 82-00378 (C.D. Cal. May 1, 1985).

¹⁰ *U.S. v. Burton*, No. CR-90-357-RMT (C.D. Cal. Oct. 1, 1990).

¹¹ 1992 HDO, 7 FCC Rcd at 4329 ¶ 1.

¹² Order, FCC 92M-791 (ALJ rel. July 16, 1992).

¹³ 1992 Summary Decision, 7 FCC Rcd at 5481 ¶ 4.

¹⁴ *Id.*

¹⁵ 1992 Rev Bd Decision, 7 FCC Rcd at 7273 ¶¶ 6-7.

6 In 1993, Burton was convicted of four counts of transmitting radio signals without a license in violation of Section 301 of the Act.¹⁶ This conviction was based on unlicensed operations occurring in 1992, the same year as Burton was in hearing on his basic character qualifications.¹⁷ Burton was sentenced to seven months in prison and one year of probation.¹⁸

7. In October 2000, Burton was once again convicted for unlicensed operation of a radio apparatus, based on activities that occurred in 1999, and was sentenced to three months in prison and one year of probation, and ordered to undergo psychological counseling.

8. On June 11, 2002, Burton filed an application for a new GMRS license.¹⁹ Based on the matters described above, as well as additional credible information forwarded to us by the Commission's Enforcement Bureau indicating that Burton may have engaged in further unlicensed operations in the period following his most recent conviction, we designated the application for hearing to determine if Burton had the requisite character qualifications to hold a Commission license.²⁰ On September 30, 2003, the Presiding Administrative Law Judge dismissed the application without prejudice, upon the joint motion of Burton and counsel for the Enforcement Bureau.²¹ Less than five months later, on February 4, 2004, Burton filed the subject application for a new GMRS license.²²

III. DISCUSSION

9 Burton has a demonstrated history of willfully and repeatedly violating the most basic of the statutory requirements within the Commission's purview – the requirement to obtain a license from the Commission before operating a radio transmitter. His repeated violations of the Act and the Commission's Rules, as reflected in four felony convictions and in two administrative adjudications finding him unqualified to hold a license at previous points in time, raise substantial and material questions of fact as to whether he will “deal truthfully with the Commission and ... comply with [the Commission's] rules and policies,”²³ and thus whether he is qualified to be a Commission licensee. In addition, the Commission's Enforcement Bureau has forwarded to us credible information indicating that Burton may have engaged in further unlicensed operations in the period following his most recent conviction, including during the period following the dismissal without prejudice of his prior GMRS

¹⁶ *US v Burton*, No. CR-92-00801-RSWL (C D Cal. 1992).

¹⁷ *Id*

¹⁸ Burton's conviction was later affirmed by the U.S. Court of Appeals for the Ninth Circuit. See *United States v Burton*, 19 F.3d 30, 1994 WL 46323 (9th Cir. 1994) (Table), *cert. denied*, 511 U.S. 1149, 114 S. Ct. 2182, 128 L. Ed 2d 900 (1994).

¹⁹ FCC File No. 0000920745 (filed June 11, 2002).

²⁰ Richard A. Burton, *Hearing Designation Order*, WT Docket No. 03-188, 18 FCC Rcd 16301 (2003).

²¹ Richard A. Burton, *Memorandum Opinion and Order*, WT Docket No. 03-188, FCC 03M-41 (ALJ rel. Sept. 30, 2003). The Presiding Judge noted that Burton had indicated that he would be unable to attend, for reasons of health, a prehearing conference scheduled for September 24, 2003, that Burton stated in a conference call on September 10, 2003, that he no longer wanted to prosecute his application, and that Burton further stated in that conference call that he had no intention of ever again applying for a GMRS authorization. *Id.* at 1.

²² FCC File No. 0001606053 (filed Feb. 4, 2004).

²³ Policy Regarding Character Qualifications in Broadcast Licensing, *Policy Statement and Order*, 5 FCC Rcd. 3252, 3252 ¶ 3 (1990), *recon. granted in part*, 6 FCC Rcd 3448 (1991) (1990 Character Policy Statement) (citing Policy Regarding Character Qualifications in Broadcast Licensing, *Policy Statement and Order*, 102 FCC 2d 1179, 1190-1191 (1986) (1986 Character Policy Statement))

application, and may be continuing to engage in such unauthorized operations at present.

10. Under the 1990 *Character Policy Statement*, as before, the Commission takes into consideration factors that may mitigate a licensee's misconduct. The Commission reviews, for example, the willfulness of the misconduct, the frequency of the misconduct, how recently the misconduct occurred, the seriousness of the misconduct, efforts made to remedy the wrong, overall record of compliance with FCC rules and policies, and rehabilitation.²⁴ At hearing, Burton may introduce evidence pertinent to these or other mitigating factors. However, Burton will not be permitted to relitigate the question of his guilt with respect to the matters for which he has been convicted, as those matters have already been resolved in the proper forum and are *res judicata*.²⁵

IV. ORDERING CLAUSES

11. ACCORDINGLY, IT IS ORDERED that, pursuant to Sections 4(i) and 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(e), the captioned application IS DESIGNATED FOR HEARING in a proceeding before an FCC Administrative Law Judge, at a time and place to be specified in a subsequent Order, upon the following issues:

- (a) To determine the effect of the criminal convictions of Richard A. Burton, and the prior administrative adjudications disqualifying Richard A. Burton to hold a license, on his qualifications to be a Commission licensee.
- (b) To determine whether Richard A. Burton has engaged in unlicensed operation of a radio transmission apparatus following his October 2000 conviction, and, if so, the effect of such conduct on his qualifications to be a Commission licensee.
- (c) In light of the evidence adduced pursuant to the foregoing issues, to determine whether Richard A. Burton is qualified to be a Commission licensee.
- (d) In light of the evidence adduced pursuant to the foregoing issues, to determine whether the captioned application filed by Richard A. Burton should be granted.

12. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.221(c) of the Commission's Rules, 47 C.F.R. § 1.221(c), in order to avail himself of the opportunity to be heard, Burton, in person or by his attorney, SHALL FILE with the Commission, within twenty days of the mailing of this *Hearing Designation Order* to him, a written appearance stating that he will appear on the date fixed for hearing and present evidence on the issues specified herein.

13. IT IS FURTHER ORDERED that, pursuant to Section 1.221(c) of the Commission's Rules, 47 C.F.R. § 1.221(c), if Burton fails to file a written appearance within the twenty-day period, or has not filed prior to the expiration of the twenty-day period a petition to dismiss without prejudice, or a petition to accept, for good cause shown, a written appearance beyond the expiration of the twenty-day period, the presiding Administrative Law Judge SHALL DISMISS the captioned application with

²⁴ 1990 *Character Policy Statement*, 5 FCC Rcd at 3252 ¶ 5.

²⁵ See 1986 *Character Policy Statement*, 102 FCC 2d at 1194 ¶ 32 ("Through the years, the Commission has generally declined 'to explore matters currently being litigated before the courts or to duplicate the ongoing investigative efforts of other government agencies charged with the responsibility of interpreting and enforcing the law in question'" (citing Revision of FCC Form 303, Application for Renewal of Broadcast Station License, and Certain Rules Relating Thereto, *Report and Order*, 59 FCC 2d 750, 763 (1976)); see also Kevin David Mitnick, *Hearing Designation Order*, 16 FCC Rcd 22740, 22743 ¶ 9 (2001).

prejudice for failure to prosecute.

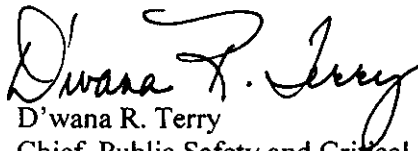
14. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(e), the burden of proceeding with the introduction of evidence and the burden of proof with respect to all of the issues specified above SHALL BE on Burton.

15. IT IS FURTHER ORDERED that the Commission's Reference Operations Division of the Consumer Information Bureau SHALL SEND a copy of this Order, via Certified Mail – Return Receipt Requested, to Richard A. Burton at the address specified by him in his captioned application: 247 Greybull Ave., Greybull, WY 82426.

16. IT IS FURTHER ORDERED that the Secretary of the Commission SHALL CAUSE to have this *Hearing Designation Order* or a summary thereof published in the Federal Register.

17. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION



D'wana R. Terry
Chief, Public Safety and Critical Infrastructure Division
Wireless Telecommunications Bureau